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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC., Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and Does 1-20, Defendants.	Case No. CV 08-04052 JF PVT **DEFENDANTS DIGITAL POINT SOLUTIONS, INC. AND SHAWN HOGAN'S REPLY BRIEF IN SUPPORT OF PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM [FRCP RULE 12(b)(6)]** Date: December 12, 2008 Time: 9:00 a.m. Dept.: Courtroom 3

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Defendants Digital Point Solutions, Inc. and Shawn Hogan ("Defendants") respectfully submit the following Reply Brief in support of their Motion to Dismiss:

I. SUMMARY OF REPLY

As detailed in Defendants' moving papers, the First Amended Complaint (FAC) is legally deficient as to Digital Point Solutions, Inc. because it fails to set forth any factual basis explaining how the corporation became involved in the alleged scheme after it was incorporated in May of 2007. The FAC is further deficient because Plaintiff seeks to impose fraud liability against the corporation based on conduct that allegedly occurred over a 3.5-year period before the entity was incorporated. Plaintiff takes this remarkable position even though the FAC is devoid of any factual basis or theory for establishing pre-incorporation liability. Based on the above, the FAC is subject to partial dismissal because it fails to state a claim under the CFAA. The same applies with respect to Plaintiff's common law fraud and Penal Code section 502 claims.

In addition, the FAC fails to state a RICO claim as to either defendant because the enterprise and nexus elements are legally deficient. In its opposition brief, Plaintiff argues the FAC appropriately alleges that Digital Point Solutions, Inc. existed throughout the alleged time frame, irrespective of the date the entity was incorporated. This misses the point, as it is the act of incorporating that confers the benefits and protections of the corporate status and establishes a sufficiently distinct entity for purposes of establishing RICO liability. Likewise, Plaintiff cannot establish an association-in-fact by simply grouping Mr. Hogan with ten Doe defendants and calling them the "Hogan Group." For good reason, the courts have ruled that plaintiffs may not fabricate the RICO enterprise by "tacking on" fictitious defendants in this manner. As detailed below, Plaintiff's RICO claims must be dismissed as to both Defendants.

II. ARGUMENT

A. Plaintiff's CFAA and State Law Fraud Claims are Legally Deficient as to Digital Point Solutions, Inc.

1. The FAC has Not Alleged any Facts Supporting Pre-Incorporation Liability.

Under California law, "[t]he corporate existence begins upon the filing of the articles [with the Secretary of State]." Cal. Corps. Code §200. And it is well established that for wrongs "committed prior to the incorporation of the defendant, the individuals committing or directing such trespass would be responsible in damages, but [the corporate] defendant cannot be made to respond for an injury done before it had an existence." *Berry v. San Francisco & N. P. R. Co.* (1875) 50 Cal. 435, 438. Relevant here, "a copy of the articles of a corporation duly certified by the Secretary of State is conclusive evidence of the formation of the corporation." Cal. Corps. Code §209. As reflected in Defendants' moving papers and per their request for judicial notice, Digital Point Solutions, Inc. was not incorporated until May 14, 2007, and therefore did not receive any of the benefits or protections of the corporate status until that date.

Notwithstanding the above, Plaintiff seeks to impose liability against Digital Point Solutions, Inc. for fraud - including treble damages under RICO - based on conduct that allegedly occurred over a 3.5-year period before the entity was incorporated. In defense of its attempts to do so, Plaintiff contends the request for judicial notice of the fact that the articles were filed in May of 2007 "does not contradict eBay's *well pleaded allegations concerning DPS's existence* and cannot serve as the basis for the wholesale dismissal of claims against it and Hogan." (Opp. 2:15-18; emphasis added).

This contention is disingenuous at best, as Plaintiff has not pled *any facts* explaining how the corporation came into existence prior to May of 2007. Nor does the FAC set forth any factual basis for holding the corporation liable for conduct that occurred prior to that date. Rather, as noted in Defendants' moving papers, the FAC simply alleges on information and belief "that *at all times relevant herein* Defendant Digital Point Solutions, Inc. was a California corporation doing business in the State of California." (FAC ¶2; emphasis added). However, the FAC fails to identify the information upon which the belief is based, and Plaintiff's conclusory allegations are insufficient to establish liability against Digital Point Solutions, Inc. prior to May of 2007. *See Sprewell v. Golden State Warriors* (9th Cir. 2001) 266 F.3d 979, 988 (conclusory allegations not entitled to judicial deference).

In its opposition brief, Plaintiff contends that it satisfied its pleading obligations by alleging that "DPS" engaged in the fraudulent scheme alleged throughout the FAC, DPS constitutes a RICO enterprise, and DPS functioned as a continuing unit in operating the scheme from December 2003 through June 2007. (Opp. 2:21-3:3). This contention is without merit, as none of these allegations are sufficient to establish facts supporting pre-incorporation liability and Plaintiff cites no case law or legal theory suggesting that they do. In that regard, Plaintiff cannot state a claim for fraud by ignoring defendant's date of incorporation and simply pretending that it existed during the time frame most convenient to Plaintiff.

Perhaps recognizing these deficiencies, Plaintiff contends for the first time in its opposition brief that "[Digital Point Solutions, Inc.] held itself out to eBay as a business entity independent from Shawn Hogan throughout the period in question." (Opp. 8:3-4). However, the FAC is devoid of any such facts and, as Plaintiff is aware, it is entirely improper to raise them for the first time in an opposition to a motion to dismiss.[1] *See Broam v. Bogan* (9th Cir. 2003) 320 F.3d 1023, 1026, fn. 2 (in adjudicating a Rule 12(b)(6) dismissal, "a court *may not* look beyond the complaint" to facts argued in plaintiff's briefs, "such as a memorandum in opposition to a defendant's motion to dismiss.") (Italics in original).[2]

Moreover, the foregoing only further establishes Defendants' point: Plaintiff must allege the factual basis for its contention that Digital Point Solutions, Inc. "held itself out" as an independent entity prior to May of 2007. For instance, Plaintiff has not alleged (either in the original complaint or the FAC) that the corporation was a party to any user agreements, that it was the signatory on any affiliate-related documents, that any corporate letterhead was used, or that funds were deposited in any corporate bank accounts prior to the date of incorporation (or at any other time). Notably, the FAC does expressly reference "User Agreements *entered into by Defendants Shawn Hogan*" and the Dunning Defendants. (FAC ¶16; emphasis added). It alleges that *Shawn Hogan* was "a registered eBay user." (FAC ¶35). However, no such allegations are made with respect to Digital Point Solutions, Inc.

Because the circumstances under which a corporation may be held liable for pre-incorporation acts are inherently limited, Defendants must be given a reasonable opportunity to defend against any such allegations at the pleading stage. *See Semegen v. Weidner* (9th Cir. 1985) 780 F.2d 727, 731 (plaintiff must provide "notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.").

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[1] Plaintiff has taken a number of factual liberties in its opposition brief, including multiple references to an FBI raid that is nowhere alleged in the FAC. (Opp. 1:6-8; 2:7-10). The same applies to numerous references to Mr. Hogan as the sole owner of Digital Point Solutions, Inc. (Opp. 2:22, 6:4-17).

[2] Notably, "[f]acts raised for the first time in plaintiff's opposition papers should be considered by the court in determining whether to grant leave to amend or to dismiss the complaint with or without prejudice." *Id.; quoting Orion Tire Corp. v. Goodyear Tire & Rubber Co.* (9th Cir. 2001). 268 F.3d 1133, 1137-38. As noted below, Defendants do not dispute that Plaintiff should be afforded an opportunity to amend.

Here, the FAC is deficient even under Rule 8's liberal pleading standards because these critical allegations have been omitted. Under Rule 8, "every complaint must, at a minimum, give fair notice and *state the elements* of each claim against each defendant plainly and succinctly." *Rasidescu v. Midland Credit Mgmt., Inc.* (S.D. Cal. 2006) 435 F. Supp. 2d 1090, 1098-1099 (emphasis added), *citing Jones v. Community Redevelopment Agency* (9th Cir. 1984) 733 F.2d 646, 649. In this case, Plaintiff has not pled the elements of any theory that would allow it to recover for the 3.5-year period of alleged wrongdoing that occurred before Digital Point Solutions, Inc. was incorporated. Because the FAC is therefore legally defective, Defendants' motion should be granted with leave to amend. In that regard, the fact that the articles were filed in May of 2007 will only serve as a basis for "the wholesale dismissal" of Plaintiff's claims to the extent Plaintiff is unable to adequately plead the requisite pre-incorporation facts or explain how the corporation became involved in the alleged scheme as of that date. (*See* Opp. 2:18).

2. The Request for Judicial Notice is Proper, and Plaintiff's Remaining Contentions Lack Merit.

In its opposition, Plaintiff contends the request for judicial notice is improper because the extent to which Digital Point Solutions, Inc. existed prior to May 2007 is a disputed fact. (Opp. 3:7-4:8). In doing so, Plaintiff concedes (as it must) that judicial notice is proper as to the fact that the articles were filed with the Secretary of State on the date stated therein. (Opp. 3:19-21). This is a critical point, as the date of filing establishes that the entity was legally incorporated on May 14, 2007. Cal. Corps. Code §209. Given that fact, Plaintiff is obligated allege a viable basis for pre-incorporation liability to the extent it seeks to recover for any alleged wrongdoing that occurred prior to that date. The FAC is deficient because it fails to do so.

Next, Plaintiff contends that the date Digital Point Solutions, Inc. was incorporated is irrelevant because Plaintiff's allegations must be taken as true and construed in the light most favorable to Plaintiff. (Opp. 3:3-6). While this is true as a general principle, as noted above, the rule does not apply to conclusory allegations or contentions that are inconsistent with facts subject to judicial notice. *See Sprewell v. Golden State Warriors* (9th Cir. 2001) 266 F.3d 979, 988; William W. Schwarzer, et. al., Federal Civil Procedure Before Trial, ¶¶9:219-9:221, p. 9-68, 9-69 (The Rutter Group 2008).

Further, if a plaintiff could properly ignore the entity's date of incorporation at the pleading stage, corporate defendants would be forced to spend considerable time and resources litigating the matter through summary judgment. Such a result would be fundamentally inequitable in cases such as this where the wrongful conduct is said to have occurred years before entity's incorporation date.

Plaintiff also argues that it has adequately stated its CFAA and related fraud claims because the specifics of the fraud are matters exclusively within defendants' control. (Opp. 6:7-17).[3] In support of this contention, Plaintiff argues that group pleading is appropriate because specific facts relating to the fraud "are peculiarly - and often exclusively - within the control of the corporate insiders . . ." (*See* Opp. 6:10-13;). However, Plaintiff has conceded in its opposition papers that "[Digital Point Solutions, Inc.] held itself out to eBay as a business entity independent from Shawn Hogan throughout the period in question." Thus, Plaintiff should have no problem explaining the corporation's involvement in the affiliate program and the manner in which it transacted business with Plaintiff.

Next, averting specifically to the CFAA claim, Plaintiff contends the allegations are not subject to Rule 9(b)'s heightened pleading requirements because the term "defraud" only means "wrongdoing." (Opp. 5:17-26). As a preliminary matter, Plaintiff has not cited any appellate authority in support of the foregoing. And as detailed in Defendants' moving papers, the Ninth Circuit has expressly held that claims predicated on a "unified course of fraudulent conduct" must be pled with particularity. *Vess v. Ciba-Geigy Corp*. USA (9th Cir. 2003) 317 F.3d 1097, 1103-1104. Further, even where fraud does not "lie at the core of the action," the plaintiff must satisfy Rule 9(b) as to the individual elements that do sound in fraud. *Id.* at 1104. This not only comports with the text of the Rule 9(b), "it also comports with the rule's purpose of protecting a defendant from reputational harm [and loss of goodwill]." *Id.* These underlying policy considerations apply with equal force to Plaintiff's CFAA, which is clearly predicated on the substantive fraud provision set forth in Section 1030(a)(4).

Moreover, even if Rule 9(b) does not apply, the FAC remains defective because it does not satisfy Rule 8's minimum pleading requirements. As detailed above, Plaintiff has not alleged any facts supporting pre-incorporation liability. Nor has Plaintiff alleged any factual basis explaining how the corporation may have become involved in the alleged scheme in May or June of 2007.[4]

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[3] This argument is premised on Mr. Hogan being the sole owner of Digital Point Solutions, Inc. Because no such allegations are made in the FAC, the argument must be disregarded. See *See Barker v. Default Resolution Network* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 65897, at 9 ("In their oppositions to the motions to dismiss, Plaintiffs include additional allegations of an attorney fee-splitting conspiracy. However, any arguments based on these allegations necessarily fail.").

B. The FAC fails to Allege a RICO Claim as to either Defendant because it has Not Established the Enterprise and Nexus Elements.

1. The FAC Fails to Adequately Allege a Distinct Legal Entity.

RICO "was passed to eradicate the infiltration of legitimate business by organized crime." *Alexander v. United States* (1993) 509 U.S. 544, 561. As such, the courts have been particularly concerned with those situations where the RICO defendant uses a legitimate corporation as a "vehicle" to effectuate the wrongful RICO pattern. *See Cedric Kushner Promotions, Ltd. v. King* (2001) 533 U.S. 158, 164-165. In that regard, the RICO defendant and the corporate enterprise are said to be sufficiently distinct because "*incorporation's basic purpose is to create a distinct legal entity*, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it." *Id.* (Emphasis added).

Based on the above, Digital Point Solutions, Inc. cannot serve as the RICO enterprise prior to May 14, 2007, because it had not yet been incorporated, did not confer any of the corporate benefits or protections until that date, and therefore could not constitute a distinct legal entity sufficient to establish RICO liability as to Mr. Hogan. Despite the clear rationale for RICO's distinctness principles, Plaintiff takes the attenuated position that Digital Point Solutions, Inc. can still serve as the RICO enterprise for the 3.5-year period prior to the date of incorporation. In support of this position, Plaintiff repeats the FAC's allegation that "Defendant Shawn Hogan and DOES 1-10 (the 'Hogan Group') engaged in activities ***through the company Digital Point Solutions, Inc. which constitutes an enterprise under RICO***." (Opp. 7:15-18; emphasis in original). While the courts have held that RICO should be liberally construed, the statute simply does not support Plaintiff's argument.

As a fall back position, Plaintiff contends that it has adequately alleged a RICO claim for the six week period between mid-May and June of 2007. This contention is equally without merit. As

[4] As such, the conclusory allegation that "DPS" caused the requisite amount of harm under the CFAA is insufficient to establish liability. (FAC ¶38).

discussed at length in Defendants' moving papers, the FAC provides no factual basis for establishing a nexus between the corporate enterprise and any predicate acts alleged to have occurred during the final six-week period. *See Barker v. Default Resolution Network* (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 65897, at 7, 9-10 (nexus requirement is an essential element that must be pled with particularity in amending complaint); *see also Farlow v. Peat, Marwick, Mitchell & Co.* (10th Cir. 1992) 956 F.2d 982, 989 (given threat of treble damages and potential injury to reputation, Rule 9(b) is particularly applicable to RICO claims). Contrary to Plaintiff's claims, the FAC does not set forth a RICO claim as to the six week period from mid-May to June of 2007.

2. The FAC Fails to Adequately Allege an Association-in-Fact Enterprise.

Finally, Plaintiff argues that "[r]egardless of whether DPS constituted a 'legal entity,' eBay has also plead a RICO claim by alleging that DPS constituted an 'association-in-fact.'" (Opp. 9:7-8). This argument is predicated on the notion that Mr. Hogan and Does 1 through 10 (artfully labeled the "Hogan Group") comprise the requisite association-in-fact. Plaintiff relies on *Gillespie v. Civiletti* (9th Cir. 1980) 629 F.2d 637, and *Does 1-60 v. Republic Health Corp.* (D.Nev. 1987) 669 F.Supp. 1511, to support its use of Doe defendants in this manner.[5]

However, both *Gillespie* and *Republic Health Corp.* are readily distinguishable. For instance, in *Gillespie*, the plaintiff did not allege a RICO claim and the Doe defendants consisted of identifiable individuals whose names were unknown to the plaintiff (such as prison guards alleged to have participated in the plaintiff's ill treatment). *Gillespie, supra*, 629 F.2d at p. 639. Similarly, in *Republic Health Corp.*, the alleged enterprise consisted of "19 Raleigh Hills hospitals" used by the defendants in committing the predicate acts. In other words, the Doe defendants in those cases were premised on existing persons rather than outright fabrications.

In this case, on the other hand, the FAC merely sets forth boilerplate Doe allegations without reference to any identifiable persons. For instance, Plaintiff alleges, "eBay is ignorant of the true names and capacities of defendants sued herein as Does 1 through 20, inclusive, and therefore sues said defendants by such fictitious names . . . eBay is informed and believes and, on that basis, alleges that

[5] Notably, the *Gillespie* court opened the discussion by indicating that the use of Doe defendants is a disfavored practice. *Gillespie, supra*, 629 F.2d at pp. 642.

each of the fictitiously named defendants is responsible in some manner to pay the obligations herein . . ." (FAC ¶12).[6]

More importantly, Plaintiff has made no attempt to address the straightforward principle that a defendant may not circumvent RICO's distinctness requirements "by simply tacking on entities to the enterprise which do not in fact operate as a 'continuing unit' or share a 'common purpose.'" *City of New York v. Smokes- Spirits.com, Inc*. (2nd Cir. 2008) 541 F.3d 425, 2008 U.S. App. LEXIS 18930, at 49-50 (rule intended to "weed out claims dressed up as RICO violations but which are not in fact."). Again, it is well established that "in an action under section 1962(c) the 'person' must be a separate and distinct entity from the 'enterprise.'" *Schreiber Distributing v. Serv-Well Furniture Co.* (9th Cir.1986) 806 F.2d 1393, 1396. To allow Plaintiff to establish an association-in-fact based solely on Mr. Hogan and fabricated Doe defendants would completely undermine these rules. Because the "Hogan Group" does not constitute a RICO enterprise, the FAC fails to state a claim as to Mr. Hogan.

Finally, the RICO claim must also be dismissed as to Digital Point Solutions, Inc. because the entity cannot serve as both the enterprise and the RICO defendant. Plaintiff does not contend otherwise in its opposition brief.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Motion to Dismiss be granted.

DATED: November 26, 2008

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[6] Plaintiff's generic allegations make no effort whatsoever to delineate the factual difference between Does 1 through 10 (the alleged Hogan Group) and Does 10 through 20 (the alleged Dunning Group). *See Currier v. Whim Co.* (N.D. Cal. 2004) 2004 U.S. Dist. LEXIS 9943, 11 ("In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise.").